No. 21,931

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

General Telephone Company of California, a corporation

Appellant,

vs.

Communications Workers of America, an unincorporated association,

Appellee.

APPELLANT'S REPLY BRIEF

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TOPICAL INDEX

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PRELIMINARY STATEMENT

On or about November 30, 1967, General Telephone Company of California (hereinafter "Company") served and filed its Appellant's Opening Brief. Thereafter on or about January 2, 1968, Communications Workers of America (hereinafter "Union") filed its Brief For The Appellee.

Company was granted until February 5, 1968, to file its Appellant's Reply Brief.

ARGUMENT

I. THE QUESTION ON APPEAL IS NOT WHETHER COMPANY AGREED TO ARBITRATE ANY ISSUE ASSOCIATED WITH NON-BARGAINING UNIT EMPLOYEES, BUT RATHER IS WHETHER THE LOWER COURT ERRED IN FINDING THAT COMPANY AGREED TO ARBITRATE THE ISSUE OF WHETHER IT HAD JUST CAUSE TO DISCHARGE A SALARIED SUPERVISOR.

In its Brief for the Appellee, Union has erroneously attempted to broaden the question for review. The question which Union would now have this Court consider is whether the collective bargaining agreement (R. 6) between Company and Union can be construed so as to show *some* arbitrable issue associated with non-bargaining unit personnel, even though such issue was not the subject of dispute between the parties. For support, the Union cites Article XIV of the collective bargaining agreement which provides that "All service by a *salaried* employee during the time that he is on salary shall be counted in determining his seniority under any of the provisions of this Article XIV *in the event such employee is returned to an hourly wage.*" (Emphasis added.)

Although the foregoing provision refers to a "salaried employee", such as Cherney was in the instant case, it has no application or relevancy to the grievance which Company was ordered to arbitrate. The foregoing would only be relevant, *if* Company was resisting arbitration over a grievance associated with seniority such as the amount, if any, of seniority applicable to a salaried employee who returned to the bargaining unit.

But that is *not* the situation herein.

This action had its origin in Company's refusal to entertain a grievance or to arbitrate whether it had just

cause to discharge Cherney, a salaried supervisor. Union petitioned the lower court to compel Company to arbitrate such grievance. In its judgment and order, the lower court ordered Company to submit to arbitration and defined the issues to be determined by the arbitrator as follows:

> "1. Was Robert L. Cherney discharged by the Company without just cause?
>
> "2. If so, what is the remedy?" (R. 73.)

While conceivably Article XIV might have some relevance to issue No. 2, an arbitrator would never get to the issue of "remedy" if Company was *not* contractually obligated to arbitrate issue No. 1.

As stated in detail in Company's Opening Brief, it is clear that the question before this Court is restricted to determining whether the lower court erred in finding that Company had contractually agreed to arbitrate whether it had just cause to discharge an employee who was a salaried supervisor at the time of his discharge. The judgment and order, by their terms, do not support Union's attempt to raise unrelated issues of arbitrability.

II. EVEN IF AN ARBITRATOR SHOULD FIND THAT COMPANY DID NOT HAVE JUST CAUSE TO DISCHARGE CHERNEY FOR HIS MISCONDUCT AS A WAGE-EARNING EMPLOYEE, HIS DISCHARGE FOR MISCONDUCT AS A SUPERVISOR WOULD STILL HAVE TO STAND.

Cherney was discharged for three reasons, only *one* of which related to his conduct as a wage-earning employee. These reasons were as follows:

> 1. ". . . Cherney had engaged in misconduct during a strike against the (Company) which commenced October 19, 1963, and ended March 15, 1964;"

2. ". . . for disloyalty to the (Company) *as a supervisor* on and after September 1, 1964, for failure to advise the (Company) that he was subpoenaed by the (Union) to be its witness in an arbitration case involving the discharge of a wage-earning employee of the (Company) for alleged misconduct during the above-described strike;"

3. "... for disloyalty to the (Company) *as a supervisor* on and after September 1, 1964 . . . for failure to voluntarily advise the (Company) of the information that he had concerning the above-described arbitration case." (R. 68-69.)

In its Brief, Union characterizes the latter two reasons in the following manner:

"The two additional grounds for discharge advanced by the Company likewise are related to strike misconduct actions which include Mr. Cherney and another wage-earning employee." (Appellee's Brief, p. 6.)

Such characterization is not accurate for it is clear from reading the latter two reasons that they were *not* based on Cherney's strike misconduct as was the case with *only* the first reason. The latter two reasons were based on Cherney's performance *as a supervisor.*

Assuming *arguendo* that Company is contractually obligated to arbitrate whether or not it had just cause to discharge Cherney for the first reason, the alleged misconduct which occurred while he was a wage-earning employee and while he was covered by either the collective bargaining agreement or the Termination of Strike and Return To Work Agreement, Company still could not be compelled to arbitrate whether it had just cause to discharge Cherney for his misconduct *as a supervisor.*

Even Union admits that:

> ". . . there is no assertion here that a supervisory employee is within the bargaining unit while he is acting as such. There is no dispute about the fact that from September 1, 1964 to February 4, 1965 Cherney was a part of Management. . . ." (Appellee's Brief, p. 7.)

However, Union then goes on to declare the following novel proposition based on Article XIV, *supra*:

> "If seniority rights of bargaining unit employees who are promoted to supervisory positions are retained, and an arbitrator can so find under the language of the instant agreement *and* [Union's emphasis] under the past practices of the Company (please see Union Exhibit 3), then they are vested rights. *Such seniority rights can only be divested if done in accordance with the collective bargaining agreement.*" (Appellee's Brief, p. 8) (Emphasis added.)

Union does not define what it means by "in accordance with the collective bargaining agreement", and it cannot, for there *are no such provisions.* If what the Union infers, intentionally or unintentionally, is that Company is contractually obligated to arbitrate discharges of all supervisors who have been promoted to supervisorial status from the bargaining unit when such discharges are based on their performance or conduct as supervisors, then Union is simply overreaching for an extension of the collective bargaining agreement to persons who are not covered thereby for the reasons set forth in Company's Opening Brief.

During trial, the lower court seemed to recognize that even if the discharge were overturned on the first ground, it would still have to stand on the basis of the latter two:

". . . But it seems to me that if you say — I mean, just for the sake of argument — that Point No. 1 is something that really they shouldn't be allowed to discharge him for now, they might demote him if they felt that he wasn't proper supervisory material. Then if they did attempt to discipline him for his conduct at that time, then the Union would, of course, be directly interested, and it would have to go to arbitration as to whether or not he would be discharged. But when it comes to his conduct after he becomes a part of management, then the question is *who* is to say what is or isn't material misconduct. *The Union is not in a position to do that.*

"It seems to me this is something management has to say. So even if you would find the arbitrator had jurisdiction over Point No. 1 and said, 'No, they can't fire him for that,' they would still be able to fire him for Point No. 2. And if that's the case, why then we are just going in circles, because it would come right back and they would fire him anyway." (Tr. 21-22.) (Emphasis added.)

Company submits that the foregoing observation was and is correct. It would be a futile act to require Company to arbitrate one ground for discharge when the results of such arbitration would not change the fact that Cherney was discharged for two other reasons which are beyond the ambit of the arbitrator's authority.

CONCLUSION

For all the reasons stated in Company's Opening Brief and in its Reply Brief, it is respectfully submitted that the decision of the lower court was erroneous and should be reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD C. WHITE

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